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RESTRAINT OF TRADE: BOARD OF TRADE RULE LIMITING HOURS OF TRADE. — One of the standard forms of trading on the Board of Trade of Chicago is in sales "to arrive," — that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. Trading in grain "to arrive" is carried on each day at special sessions termed the "Call." These sessions are not limited as to duration, but they usually last about half an hour. In 1906 the board adopted a rule by which members were prohibited from purchasing or offering to purchase, in the interval between the close of the "call" and the opening of the session on the next business day, grain "to arrive" at any price other than the closing bid at the "call."

In Board of Trade of Chicago v. *United States* this rule was adjudged to be in violation of the Anti-Trust Act,[1] the lower court striking from the record allegations by the defendants that the purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade which had been acquired by four or five warehousemen. The case was rested by the government upon the proposition that a rule or agreement, by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day, was an illegal restraint of trade under the Anti-Trust Act.

This decree was reversed by the Supreme Court of the United States,[2] the court saying: "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrained competition. Every agreement concerning trade, every regulation of trade, restrains.

[1] 26 STAT. AT L. 209.

[2] 38 Sup. Ct. Rep. 242 (1918).

To bind, to restrain is of the very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Examining the facts, the court concluded that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Act.

The chief questions which the enforcement of the Anti-Trust Act has required the courts to answer are (1) what acts concern and affect "commerce among the several states;" and (2) what acts are "in restraint" of trade or commerce, and what acts "monopolize" trade or commerce.

In *United States* v. *E. C. Knight Co.*[3] the court held that acts, tending to give to one business unit the control of the business of refining sugar, related to manufacture and not to commerce. If facts similar to those which doubtless existed in the Knight Case were today properly pleaded and proved, the decision would probably be that the acts did affect interstate commerce. The Knight Case has ceased to be a safe guide as to the conclusion which the court will probably draw from similar facts. But the question to which the court addressed itself in the Knight Case of course remains as the question logically first to be considered in any proceeding under the Anti-Trust Act. In the principal case the acts in question admittedly concerned and affected interstate commerce.

Therefore the question arises: Was the rule in question "in restraint of trade"? If we split this phrase into four words, and give to each word its dictionary value, we must answer that of course the rule was in restraint of trade. By its operation all the members of the board of trade of the greatest grain market in the world were restrained, about nineteen hours out of every twenty-four, from trading in grain "to arrive" except at a specified price. They were restrained from contracting to buy at any price which they might desire to pay.

This decision may accordingly properly be cited as an authority that the court will not treat the phrase "in restraint of trade" as a phrase to be interpreted simply by taking the dictionary value of each of the four words used. If this standard is rejected, what standard is to be applied?

The phrase "contract in restraint of trade" has been used in the law in the sense of any contract by force of which a person put some restraint upon his activities in trade. Thus, if a person sold a business, including the good-will incident to such business, and contracted not to compete with his vendee for five years, within an area of five miles, this contract might be called a contract "in restraint of trade." In the early common law, this use of the phrase was the common use. But the phrase also came to be used with a sinister connotation, — as the equivalent of "to the detriment of trade." The Anti-Trust Act was passed in 1890, and abundant illustrations of the use of the phrase, with a sinister connotation, can be found prior to 1890 in American constitutions, statutes, and judicial decisions. It would be difficult to say which use of the phrase was the more common in America in 1890.

The Supreme Court of the United States has been called upon to determine in which sense Congress used the phrase. If Congress used

[3] 156 U. S. 1 (1894).

the phrase, taking the words in the early common-law meaning, then the person (engaged in interstate commerce) who sold out his business and agreed not to compete with his vendee was intended by Congress to be treated as a criminal; likewise, of every person (engaged in interstate commerce) who entered into any contract calling for his exclusive services; likewise, of the members of a labor union (engaged in interstate commerce) who agreed between themselves not to work more than a specified number of hours a day. It would be easy to multiply examples which make it seem very unreasonable to suppose that Congress used the phrase in the early common-law meaning.

This is made even plainer if we consider the closely associated question of the interpretation of the word "monopolize." A monopoly, as that word was used in the early common law, meant an exclusive control of some branch of trade through royal grant. In 1890, the only things in the United States analogous to monopolies in this sense were patents and copyrights. Congress did not intend to treat as criminals persons (engaged in interstate commerce) who controlled patented or copyrighted articles. This word was used with a sinister connotation, — to indicate acquiring control of some part of interstate commerce by improper means. As indisputably "monopolizing" is not used in its early common-law meaning, but is used with a sinister connotation, it is reasonable to suppose that Congress may have used the phrase "in restraint of trade" with a sinister connotation, and not in its early common-law meaning.

On this construction of the statute — which, by reason of these considerations, seems to be plainly the proper construction — it becomes the duty of the court to examine the facts of each case, and to determine whether the acts alleged to be "in restraint of trade" are to the detriment of trade. This is precisely the manner in which the court approached the problem in the principal case.

The court, however, used one sentence which may come back to give trouble. "The true test of legality," it said, "is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." The Anti-Trust Act condemns acts which are in restraint of "trade," not acts which are in restraint of "competition." The thought that "competition is the life of trade" has received such wide acceptance that, it is submitted, the court might wisely adopt a secondary rule, for the construction of the Anti-Trust Act, to the effect that acts which limit the freedom of competition (including internal competition) shall be treated as, *prima facie*, acts which are to the detriment of trade. But a cessation of competition *may* conceivably be to the advantage of trade, — may make for more trade rather than less trade, and may produce this beneficial result without the infliction of hardship upon anyone.

PROXIMATE CAUSE. — NEGLIGENT OMISSION OF DUTY AS INTERVENING ACT. — The question of proximate causation is often so complicated with questions of negligence and of "last clear chance" as to be difficult of solution without careful analysis. The general legal principles